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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1518

THE TELEX CORPORATION and TELEX COMPUTER PRODUCTS, INC.,
Petitioners,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

Brief of Transamerica Computer Company, Memorex Corporation, Marshall Industries, Hudson General Corporation and DPF Incorporated as *Amici Curiae* in Support of the Petition for a Writ of Certiorari

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With the consent of petitioners The Telex Corporation and Telex Computer Products, Inc. (hereinafter collectively referred to as "Telex") and respondent International Business Machines Corporation (hereinafter referred to as "IBM"),[1] Transamerica

1. While Telex's consent was unqualified, IBM's consent was conditioned upon *amici's* agreement to (1) file and serve their brief at the same time Telex files its petition, and (2) state as part of the brief the grounds required by Rule 42(3) to be stated in support of a motion for leave to file a brief *amicus curiae*. *Amici's* compliance with the second condition is contained in Parts I and II of this brief, *infra*. The originals of letters from counsel for Telex and IBM are on file with the Clerk's office.

Computer Company, Memorex Corporation, Marshall Industries, Hudson General Corporation and DPF Incorporated file this brief *amicus curiae* in support of Telex's petition for a writ of certiorari.

I.

INTEREST OF AMICI

Each of the companies on whose behalf this brief is filed is presently a plaintiff in antitrust litigation against IBM and each competes, or formerly competed, with IBM in the distribution, sale and leasing of peripheral equipment of the type made available by Telex. The interest of *amici* in this case stems not only from this related litigation, described below, which involves claims similar to those on which Telex prevailed in the trial court but also from the long-range impact of the decision below on basic and fundamental issues facing the computer industry. To be sure, *amici's* appearance here in support of Telex's petition is motivated in part by the effect of the decision of the court below on their pending litigation against IBM. This Court's resolution of the issues presented by Telex's petition will similarly affect the future course of that litigation and, in some cases, may well be dispositive.

Lawsuits, however, are but impermanent events in the overall life cycle of a company. The companies appearing as *amici* are only temporary parties to litigation but, more importantly, are full-time members of the business community whose long-range plans and future participation in the computer industry will be governed in large part by what this Court does about this case. *Amici* are thus but representatives of a larger group of businesses and investors who eagerly await this Court's guidance concerning the standards of permissible conduct in an industry vital to the nation's economic and social well-being.

A) Description of Amici

Transamerica Computer Company, a wholly-owned subsidiary of Transamerica Corporation, has since 1969 participated in the computer industry by activities which characterize it as a "third party leasing company." It purchases from others in the industry various types of computer devices, including central processing units ("CPUs") and peripherals, and leases them to end-users of such equipment. Transamerica Computer Company thus serves as a source of capital in an industry whose emphasis on leasing, rather than sales, renders it extremely capital intensive. Unlike a traditional lending institution, however, Transamerica Computer Company becomes the owner of the equipment purchased by it and thereby assumes the associated market risks. During the period 1969-1971, Transamerica Computer Company purchased from Telex certain plug-compatible tape drives, disc drives and controllers at a cost of approximately $60 million.

Memorex Corporation, headquartered in Santa Clara, California, is a manufacturer and lessor of a wide range of plug-compatible peripheral products, including disc drives, controllers, transmission control units and disc packs. Memorex also entered the computer systems market but was forced to discontinue those operations. Memorex Corporation is the parent company of ILC Peripherals Leasing Corporation, a leasing company which purchased peripheral devices manufactured by Memorex and leased them to end-users. Memorex also has a number of foreign subsidiaries engaged in computer activities in Europe, Canada and Japan.

Marshall Industries, headquartered in San Marino, California, formerly engaged in the manufacture and marketing of plug-compatible disc drives and controllers through its Marshall Data Systems Division. Marshall began its activities in the peripheral market in 1968 and exited in early 1972 when it sold Marshall Data Systems Division to Mohawk Data Sciences at a substantial loss.

Hudson General Corporation, with its principal offices in Great Neck, New York, conducts its computer activities through its wholly-owned subsidiary, Hudleasco Corporation. Hudleasco, a third party leasing company, first entered the industry by leasing Univac systems. During the period 1969-1972, Hudleasco purchased from Telex various plug-compatible peripheral devices at a cost to it of approximately $34 million.

DPF Incorporated is a leasing company located in Hartsdale, New York. Since 1961, its principal business has been the purchase of computer systems, including peripherals, for lease to end-users. Substantially all of the equipment owned by DPF was purchased from IBM. It purchased, through the end of 1970, IBM plug-compatible peripheral devices at an aggregate cost of approximately $45 million.

B) The Pending Related Litigation

At various times in the last three months of 1973, *amici* Transamerica Computer Company, Memorex Corporation, Hudson General Corporation and Marshall Industries filed suit against IBM.[2] Each action alleged IBM's monopolization and attempted monopolization of the market of peripheral devices plug-compatible with IBM CPUs, either solely or together with other Section 2 claims. A similar action was filed by California Com-

2. Three separate actions were filed by the Memorex plaintiffs. The cases are *Transamerica Computer Company v. International Business Machines Corporation,* Civ. No. C-73-1832-WTS (N.D.Cal.); *Memorex Corporation, et al. v. International Business Machines Corporation,* Civ. No. C-73-2239-SC (N.D.Cal.); *ILC Peripherals Leasing Corporation v. International Business Machines Corporation,* Civ. No. C-73-2238-RHS (N.D.Cal.); *Memorex A.B. (Sweden), et al. v. International Business Machines Corporation,* Civ. No. C-73-2240-ACW (N.D.Cal.); *Marshall Industries v. International Business Machines Corporation,* Civ. No. 73-3043-WJF (C.D.Cal.); and *Hudson General Corporation v. International Business Machines Corporation,* Civ. No. 73-2796-F (C.D.Cal.).

puter Products, Inc., a manufacturer of peripheral devices, in October 1973.[3]

Late in December 1973, IBM moved to transfer the cases to a single district for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407(c)(ii). On May 13, 1974, the Judicial Panel on Multidistrict Litigation transferred the actions to the Northern District of California and assigned them to Chief Judge Ray McNichols of the District of Idaho for coordinated or consolidated pretrial proceedings (hereinafter referred to as "the MDL No. 163 cases"). *In re IBM Peripheral EDP Devices Antitrust Litigation,* 375 F.Supp. 1376 (J.P.M.L. 1974).

Following transfer, pretrial orders outlining the future course of the proceedings were agreed upon and discovery by all parties commenced. In August 1974, an additional action was filed against IBM in the Northern District of California by Forro Precision, Inc., a company engaged in the manufacture and sale of components used in peripheral devices.[4] The following month, DPF Incorporated filed suit against IBM.[5] The *DPF* and *Forro* cases were consolidated for pretrial proceedings with the MDL No. 163 cases in November 1974.

In November 1974, Memory Technology, Inc., a manufacturer of semi-conductor and read only memory systems, filed suit against IBM in the District of Massachusetts.[6] In January 1975, Sanders Associates, Inc., a manufacturer of plug-compatible computer terminals, likewise commenced an action against IBM in the District of New Hampshire.[7] In February 1975, IBM moved the

3. *California Computer Products, Inc., et al. v. International Business Machines Corporation,* Civ. No. 73-2331-F (C.D.Cal.).

4. *Forro Precision, Inc. v. International Business Machines Corporation,* Civ. No. C-74-1653 RHS (N.D.Cal.).

5. *DPF Incorporated v. International Business Machines Corporation,* Civ. No. C-74-1920 CBR (N.D.Cal.).

6. *Memory Technology, Inc. v. International Business Machines Corporation,* Civ. No. 74-5051-S (D.Mass.).

7. *Sanders Associates, Inc., et al. v. International Business Machines Corporation,* Civ. No. C 7514 (D.N.H.).

Judicial Panel on Multidistrict Litigation to transfer the two new cases to the Northern District of California for inclusion in the MDL No. 163 proceedings. This motion was granted by the Panel in its opinion and order of May 5, 1975. *In re IBM Peripheral EDP Devices Antitrust Litigation,* Docket No. 163 (J.P. M.L., May 5, 1975).

Discovery by all parties is continuing and trial of an as-yet undetermined case or group of cases is expected to commence in 1976.

II.

REASONS FOR GRANTING THE WRIT

The decision of the court below raises issues of fundamental importance to all affected by conditions in the computer industry and, because of the ever-increasing role played by that industry in our daily lives, the decision thus affects each of us. The ultimate resolution of those issues will have far-reaching implications for the computer industry and for the financial and investment community upon whom the participants in that industry heavily depend for the capital necessary to compete effectively in an industry dominated by the respondent IBM. The future course of the massive litigation described above will in large part depend upon which of the diametrically opposed views of the trial court and the court below represents a proper evaluation of Section 2 of the Sherman Act as applied to IBM. Finally, the decision of the court below is in direct conflict with decisions of this Court and the Court of Appeals for the Second Circuit and, if permitted to stand, will reverse the consistent course of Section 2 development and render it helpless to impede and prohibit domination of critical parts of the nation's economy by a single firm with a massive aggregation of capital.

For these reasons, discussed in more detail immediately below, *amici* urge this Court to grant the petition.

A) The Implications of This Case to the Pending Litigation

That the issues raised by this case have a significance transcending the interests of the parties is apparent from the massive litigation which followed the trial court decision. There are now 11 cases pending before Judge McNichols. Some of the cases are relatively more complex than others, but each will inevitably consume vast amounts of judicial and litigant resources.

Each of the 11 cases contains one or more claims based upon the trial court decision in this case. Indeed, it was because the cases shared a common nucleus of factual and legal issues based upon this case that the Panel ordered them transferred for consolidated and coordinated pretrial proceedings. *In re IBM Peripheral EDP Devices Antitrust Litigation,* 375 F.Supp. 1376, 1377 (J.P.M.L. 1974).

Resolution of the issues presented by this case will have a significant and, perhaps in some instances, dispositive effect on the ultimate determination of the MDL No. 163 cases. Equally important is the impact a decision by this Court will have on those whose decision to litigate will be determined by the ultimate result of this case.[8] *Amici* believe that the precedential effect of this Court's review of the issues presented provides a persuasive and appropriate basis for granting Telex's petition.

B) The Implications of This Case to the Computer Industry and the Financial Community

The importance of the computer industry to the nation's economy cannot be gainsaid. As the trial court recognized, this industry is one "upon which most other industries of the country and countless businesses, as well as science and space explorations,

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8. *Amici* are informed that IBM has entered into "tolling" agreements with at least two companies in which IBM agreed not to assert the statute of limitations defense in exchange for an agreement not to file suit pending the outcome of this case.

vitally depend." (F. 1, App. 3). Almost since its inception, the computer industry has been dominated by the respondent IBM. Prior to the acts of IBM about which Telex complains, the peripheral market offered attractive rewards for new entrants and, in turn, presented desirable investment opportunities to the financial community whose willingness to supply equity and debt capital made meaningful entry possible.

There is no doubt that IBM's activities undertaken in response to the perceived threat of its plug-compatible peripheral competitors have caused a reversal of the way in which the industry is viewed today. Those engaged in the peripheral market have suffered recurring losses of such enormity as to threaten (and in the case of the peripherals division of *amici* Marshall, terminate) their continuing existence. Perhaps more importantly for the long-range future of the industry, the availability of external capital has disappeared. Because computer products are offered on an almost exclusively lease-only basis, the prospect of significant new entry has therefore dwindled to zero.[9]

We believe that the structure of the computer industry for decades to come will reflect and be determined by the ultimate disposition of this case. If the acts of IBM are judicially condoned, as they were by the court below, the unmistakable warning conveyed by those acts to present and potential members of the industry will doubtless be heeded. Those companies who choose to remain in the industry will do so at their peril, with the awareness that they exist at the sufferance of IBM. Those contemplating entry will look elsewhere. And, in both cases, the direct relationship between the availability of capital and meaningful entry and growth will insure for IBM the continuation of its role as the dominant and, perhaps ultimately, the sole participant in the industry.

9. *See generally* G. Brock, The U.S. Computer Industry: A Study of Market Power, ch. 5 (Ballinger 1975).

C) The Decision Below Conflicts With and Is Contrary to Decisions of This Court and the Second Circuit

The court below, having held to be erroneous the trial court's relevant market determination, focused its attention on the acts of IBM directed at its plug-compatible peripheral competitors.[10] Expressly assuming IBM's possession of monopoly power (App. 237), the court posed the following question:

> [W]ere the changes in marketing methods under such conditions made by IBM *lawful?* (App. 237) (emphasis added).

After discussion of this issue, the court below concluded that the IBM acts were "ordinary marketing methods" (App. 250) and did not constitute the "use" of monopoly which, in the court's view, "is all the law condemns." (App. 251).

The court below, however, asked and answered a question which, though dispositive for that court, is irrelevant, under decisions of this Court, to the ultimate inquiry of whether IBM had violated Section 2. Monopoly power, once shown to exist, need only be shown to have been wilfully maintained or acquired for the offense to be made complete. Monopolization is basically a structural offense and the means by which monopoly power has been acquired or is being maintained need not be unlawful nor unfair.

This much was made clear in *United States v. Aluminum Company of America,* 148 F.2d 416 (2d Cir. 1946), where Judge Hand wrote:

> So here, "Alcoa" meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to "monopolize" that market, however innocently it otherwise proceeded. 148 F.2d at 432.

10. The acts are described by the court below at App. 237-249.

This Court endorsed this view of Section 2 in *United States v. Griffith,* 334 U.S. 100 (1948), when it said:

> It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. *It is sufficient that a restraint of trade or monopoly results as a consequence of a defendant's conduct or business arrangements.* (citations omitted). *To require a greater showing would cripple the Act.* 334 U.S. at 105 (emphasis added).

Five years later, Judge Wyzanski summarized in *United States v. United Shoe Machinery Corp.,* 110 F.Supp. 295 (D.Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954), what until the decision of the court below has been the consistently applied view of this aspect of Section 2. He stated that one in possession of monopoly power violates Section 2 "if that power is to any substantial extent the result of barriers erected by its own business methods (even though not predatory, immoral, or restraining in violation of § 1)" unless the defendant "shows that the barriers are *exclusively* the result of superior skill, superior products, natural advantages, technological or economic efficiency, scientific research, low margins of profit maintained permanently and without discrimination, legal licenses, or the like." 110 F.Supp. at 297 (emphasis in original).

To require, as did the court below, proof of illegal acts by which monopoly power is maintained as a prerequisite to liability under Section 2 is thus in direct conflict with long-standing Section 2 decisions of this Court and with *Alcoa.* More than simply erroneous, however, the view taken by the court below emasculates the usefulness of Section 2 as a means to impede and prohibit retention of monopoly power and would limit its effectiveness to only those cases where such power is maintained by acts independently unlawful.

The court below also believed that monopoly power must be *used,* i.e., exercised, in order for a Section 2 violation to occur.[11] That this belief is erroneous is made clear by this Court's decisions in *American Tobacco Co. v. United States,* 328 U.S. 781 (1946) and *United States v. Griffith, supra.*

Monopoly power is "the power to control prices or exclude competition." *United States* v. *E. I. duPont de Nemours & Co.,* 351 U.S. 377, 391 (1956); *United States v. Grinnell Corp.,* 384 U.S. 563, 571 (1956). At issue in *American Tobacco* was whether a violation of Section 2 requires proof of *actual* exclusion of competitors. This Court's resolution of the issue was unmistakable:

> Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act. 328 U.S. at 810.

The court below not only ignored this part of the *American Tobacco* opinion but also indicated that "[t]he *American Tobacco* opinion is thus not particularly helpful in this case except as to the acceptance of portions of the *Alcoa* opinion." (App. 252).

United States v. Griffith, supra, a case upon which the court below relied, likewise makes clear that the "use" requirement of monopoly power held to be necessary by the court below has no basis in Section 2 law. In *Griffith,* this Court noted:

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11. Thus, the court stated that "[t]he cases relied upon by the trial court all refer to the 'use of monopoly power' and this is all the law condemns." (App. 251). Later, in mentioning the "thrust upon" exceptions announced in *Alcoa,* the court stated (App. 252-253):

> If the "thrust upon" exceptions are adopted, they must be fitted in with the requirement that a "use" of monopoly power is required.

Operating under this view of Section 2, the court held that "it must be concluded that IBM did not *use* monopoly power even if it [be] assumed that it possessed such power." (App. 251) (emphasis in original).

> So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 *even though it remains unexercised*. . . . It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful. 334 U.S. at 107 (emphasis added).

Inexplicably, the court below cited the second sentence of the above-quoted portion of *Griffith* in support of its "use" requirement theory and simply ignored the earlier language. (App. 251).

The clear conflict with and misapplication of the decisions of this Court and the Second Circuit's decision in *Alcoa* require, *amici* submit, review by this Court.[12]

III.

CONCLUSION

Resolution of the issues presented by this case will have a profound and potentially dispositive impact on the massive litigation described above. The importance of the case to the computer industry and its future cannot be doubted. The emasculation of Section 2 by the court below and its plain rejection of 85 years of Section 2 development by this Court and others is manifest. For

12. In the interest of brevity, *amici* have elected to focus their discussion on certain aspects of the opinion of the court below, at the exclusion of others. Our silence on these other issues—relevant market, attempt to monopolize and the court's total disregard of Rule 52(a), among others—is not an endorsement of the court's resolution of those issues. Indeed, with respect to the court's one-sentence disposition of the attempt to monopolize findings and conclusions by the trial court, we are constrained to note that IBM was found by the trial court to have attempted to monopolize *the very market* (peripherals) held to constitute the relevant market by the court below. (*See* App. 152). The court disregarded this fact and held that the attempt to monopolize issue "need not be separately considered." (App. 254).

each of these reasons, this Court should review the decision of the court below.

Dated: May 30, 1975.

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